STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 5, 2014
v	No. 313814 Wayne Circuit Court
JOHN DAVID MARSHALL, Defendant-Appellant.	LC No. 12-002077-FC

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of criminal sexual conduct, first-degree (CSC I), MCL 750.520b (multiple variables), one count of CSC, second degree (CSC II), MCL 750.520c (multiple variables), and three counts of CSC, third degree (CSC III), MCL 750.520d (multiple variables). Defendant was originally sentenced to serve 25 to 40 years for CSC I, and to serve 9 to 15 years on each of the other counts, to run consecutively to count one and concurrently with each other. Defendant was later resentenced as a second habitual offender, MCL 769.10, to serve 29 to 45 years for CSC I, and to serve 14 to 22.5 years each all other counts, with all sentences to run concurrently. He appeals as of right. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The complainant testified that when she was between the ages of twelve and fourteen, she was sexually assaulted by defendant, her uncle, numerous times. The complainant testified that when she was 14 years old, she told a teacher at her middle school, Mr. Greg Geck, about the abuse, as well as her mother and another relative. Shortly thereafter, her family moved to Georgia. When she was 21 years of age, the complainant reported the abuse to the police following an argument with defendant's girlfriend.

At trial, defendant sought to introduce testimony from representatives of Child Protective Services (CPS) and Detroit Public Schools (DPS) regarding the absence of any documentation of reports of sexual abuse. The court did not allow the testimony. Defendant presented witnesses in support of the theory that the complainant's decision to report the allegations to law enforcement was in retaliation for defendant's girlfriend's decision to cease giving the complainant's family financial support. The jury convicted defendant as described above. This appeal followed.

II. ADMISSION OF EVIDENCE

Defendant first argues that the trial court erred in refusing to admit the testimony of witnesses concerning the child-abuse reporting procedures of Detroit Public Schools (DPS) and Child Protective Services (CPS). This Court reviews a trial court's decision to admit or deny evidence for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). An abuse of discretion occurs where the trial court chooses an outcome falling outside a "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant argues that the testimony of John Vucetich, section manager with Child Protective Services, would have been probative of whether the complainant reported abuse to Mr. Geck, as the complainant testified, and, therefore was probative of whether the abuse occurred. Similarly, defendant argues that the testimony of Barbara Smith, head of the guidance department at DPS, was relevant to demonstrate that a report of abuse had not been made, as was claimed. Defendant thus sought for the jury to be able to infer, from the absence of a report, that no assault had in fact occurred, and thus sought to challenge the credibility of the complainant. At trial, defendant asserted the testimony was admissible under MRE 803(7). MRE 803(7) sets forth an exception to the general exclusion of testimony under the hearsay rule, under the following described circumstances:

> (7) *Absence of entry in records kept in accordance with the provisions of paragraph (6).* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), *to prove the nonoccurrence or nonexistence of the matter*, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness. [Emphasis added.]

However, MRE 803(7) is not applicable to the absence of an entire record. Rather, the rule provides that where a record is kept in the regular course of business, evidence that a matter was not entered into that record may be admissible. The trial court thus did not err in refusing to admit the offered testimony under this hearsay exception.

Arguably, the testimony could have been found admissible under MRE 803(10). That rule provides for the admission of evidence proving the absence of a *public record* or entry:

> (10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

In the instant case, defendant did not seek to introduce evidence showing that DPS or CPS maintained a file on the complainant, and the incident concerning defendant was not entered into it. Rather, defendant was trying to establish the absence of any written record of a report by the complainant to a school teacher of the sexual abuse. Defendant did not, however, contend at trial

that the testimony should have been admitted under MCR 803(10). Nor, in fact, does defendant so argue on appeal.

Regardless of whether defendant has properly preserved the issue for appeal, however, we do not fault the trial court, or find that it abused its discretion, in declining to *sua sponte* admit the offered testimony under the arguably correct hearsay exception. All admitted evidence must be relevant. MRE 402. Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012). It was undisputed at trial that no report had ever been made to CPS or the police of any assault upon the complainant. Given the undisputed nature of that fact, testimony establishing the fact would not have made that fact more probable or less probable than it otherwise was. The testimony was therefore not relevant under MRE 401. Moreover, defense counsel indeed argued, based on the undisputed fact of the absence of any report, that no assault had in fact occurred, and that the complainant's testimony to the contrary lacked credibility. Defendant therefore was not denied the opportunity to present a defense.

Defendant's desired inference that the lack of any record of a reported assault means that the assault did not occur is based on a series of increasingly tenuous inferences and conjecture. It presumes, for example, that if the complainant had told Mr. Geck of the abuse, Mr. Geck would have clearly understood that it was of such a character that he necessarily would have reported it to the school office. It further presumes that unknown personnel in the school office necessarily would then have reported it to CPS. And it further presumes that CPS necessarily then would have opened a file and investigated the reported abuse. The trial court was not required to make all of these presumptions in assessing the relevance of the proffered testimony, particularly when the fact at issue was not even in dispute. Such speculation does not infuse evidence with relevance so to make it admissible under MRE 402. *People v Mills*, 450 Mich 61, 66-68; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995); see also *People v Diaz*, 98 Mich App 675, 684; 296 NW2d 337 (1980) ("The wholly speculative inference advanced by defendant does not make the existence of any fact of consequence more probable or less probable. The witness was properly excluded."). It does not follow that that the lack of a record of an assault means that no assault occurred. Many other alternative explanations exist. As the trial court correctly noted, "Just because there was a fire doesn't mean that the fire engines responded." We find no reversible error in the trial court's refusal to admit this evidence.

Moreover, assuming arguendo that the evidence possessed some relevance, any error in the trial court's ruling was harmless. Defendant was permitted to argue that the absence of a report from DPS or CPS undermined the complainant's credibility. The prosecution did not assert that a report had been made in the instant case, and instead acknowledged that a report had not been made. Thus, the denial of the admission of the offered testimony, even if erroneous, was not outcome determinative and does not require reversal. *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013).

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor committed misconduct by failing to inform defense counsel of Mr. Geck's presence in the courtroom, while knowing that defendant wanted to call the teacher as a witness. Defendant claims that because he was not given the opportunity

to call the teacher as a witness, he was denied a fair trial and again the opportunity to present a defense against the complainant's allegations.

We review this unpreserved claim of prosecutorial misconduct for plain error affecting substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Review of unpreserved issues of prosecutorial misconduct is precluded unless a failure to review the issue would result in a miscarriage of justice. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

Upon review of the trial record, there is no evidence that the prosecutor did anything to prevent defense counsel from speaking with the witness on defendant's behalf. In fact, at the hearing on defendant's motion for resentencing, the court told appellate counsel that when the teacher "came in the door of the courtroom, . . . [defense trial counsel] actually spoke to him and excused him." There is nothing of record to indicate the court was in error, nor does defendant assert on appeal that it was. Accordingly, defendant's claim that the prosecutor committed misconduct is without merit.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also faults his trial counsel for not calling Mr. Geck as a witness, claiming ineffective assistance of counsel. Defendant preserved this claim by moving for a new trial and requesting a *Ginther*[1] hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658–659; 620 NW2d 19 (2000). To prove ineffective assistance of counsel, the defendant must show that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Id*. at 659.

Failure to call a particular witness at trial is presumed to be a matter of strategy. *People v Seals*, 285 Mich App 1, 20; 776 NW2d 314 (2009). However, failing to call a witness will constitute ineffective assistance of counsel when it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Defendant has not shown that defense counsel's failure to call the complainant's former teacher as a witness deprived him of a substantial defense.

Defendant argues that the teacher's testimony "would have solved [the] debate" regarding whether the complainant "was credible in testifying she was assaulted, reported the incident to [her teacher] and later went to the hospital." However, the prosecutor indicated that the teacher would have testified that "he had no independent memory of this particular incident" and "did not remember [the complainant] personally." Further, according to the prosecutor, the teacher would not have testified that he did not remember making a report, as defendant claimed; rather, the teacher informed the prosecutor that he had never made a report to CPS "because his

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

directive is to take them to the office and let a superior do it." Assuming this is true, the evidence would not have tended to prove a fact of consequence.

Because defendant has not shown that the absence of the teacher's testimony deprived him of a substantial defense, or that the result of the proceeding would have been different if the testimony had been admitted, he has not met his burden to show that his trial counsel was ineffective. *People v McGraw*, 484 Mich 120, 142; 771 NW2d 655 (2009), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

V. SENTENCING

Defendant also argues that the court's resentencing was excessive and imposed out of vindictiveness. "A presumption of vindictiveness arises when a defendant is resentenced by the same judge and the second sentence imposed is longer than the first." *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). However, "the presumption of vindictiveness may be overcome only when the extent of the increase in the sentence bears a reasonable relationship to the new information." *People v Mazzie*, 429 Mich 29, 36; 413 NW2d 1 (1987). "Therefore trial judges, when resentencing defendants, must state on the record upon what new information they are basing any increase in the length of the sentence." *Id*. at 37 n 2.

In his motion for resentencing, defendant asked the court to remove the requirement for lifetime electronic monitoring, and to change the sentences from consecutive to concurrent terms, noting that the statute authorizing the original terms of the sentence was not enacted until 2006, while the crimes were committed in 2002-2004. The court granted the request to remove lifetime electronic monitoring from defendant's sentence and agreed with defense counsel that the court was not authorized by statute prior to 2006 to impose consecutive sentencing for defendant's CSC convictions committed in 2002. The court also took the opportunity at resentencing to correct its earlier error of not having applied the habitual second offense increase to defendant's CSC II and CSC III convictions. Application of the habitual second offense increased the sentence on defendant's CSC II and CSC III convictions from a maximum period of 15 years to a maximum of 22.5 years.

The trial court did not agree with defendant's request for a lower minimum sentence on count one, CSC I, from 25 years to 22 years. The original sentence imposed by the court was 25 to 40 years for CSC I, and 9 to 15 years for each of the other counts, to run concurrently with each other and consecutively to the sentence for CSC I. The second sentence imposed by the court was 29 to 40 years for CSC I, and 15 to 22.5 years on counts two through five, with all sentences to run concurrently. The second sentence imposed by the court did not actually increase the minimum term defendant would serve under the previous sentence, because the new sentences ran concurrently to each other, while the previous sentence was to run consecutively. Thus, defendant's combined minimum sentence was to have been 34 years. Because defendant cannot show that his resentence was excessive, he is not entitled to relief on this issue.

Affirmed.

/s/ Henry William Saad
/s/ Mark T. Boonstra